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<b>D.J., Appellant</b>	)	
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<b>and</b>	)	<b>Docket No. 13-1836</b>
	)	<b>Issued: March 5, 2014</b>
<b>ARCHITECT OF THE CAPITOL, CAPITOL</b>	)	
<b>BUILDING, S.W., Washington, DC, Employer</b>	)	
	)	

*Richard A. Daniels, Esq.*, for the appellant  
*Office of Solicitor*, for the Director

COLLEEN DUFFY KIKO, Judge  
PATRICIA HOWARD FITZGERALD, Judge  
JAMES A. HAYNES, Alternate Judge

<sup>1</sup> 5 U.S.C. § 8101 *et seq.*

## **FACTUAL HISTORY**

On January 13, 2004 appellant, then a 40-year-old-motor vehicle operator (messenger), filed a traumatic injury claim alleging that on January 8, 2004 he injured his lower back while lifting xerox boxes. OWCP accepted the claim for lumbar disc syndrome with myelopathy. Appellant stopped work on January 12, 2004. OWCP paid compensation benefits and was eventually placed on the periodic rolls.

On March 4, 2011 OWCP referred appellant, together with a statement of accepted facts and the medical record, to Dr. Kenneth M. Fine, a Board-certified orthopedic surgeon, for a second-opinion examination to determine the extent of his continuing employment-related residuals and disability. In a March 22, 2011 report, Dr. Fine noted the history of injury, provided examination findings and reviewed diagnostic imaging studies from 2004. He diagnosed a low back strain or sprain connected to the work injury but found no significant clinical signs of myelopathy as his reflexes were normal and appellant did not have clonus or down going toes. Dr. Fine further stated that there were no objective complaints. He advised that repeat diagnostic studies were needed as earlier studies revealed right L5 and bilateral S1 radiculopathy with peripheral neuropathy and disc desiccation and bulging at L5-S1 with no disc herniation. Following further diagnostic testing, which included a bone scan, an magnetic resonance imaging (MRI) scan and electromyogram (EMG) and nerve conduction velocity (NCV) studies, Dr. Fine opined in a May 31, 2011 addendum that appellant had no restrictions related to his work injury and would be able to work light duty and with proper treatment, full duty. Based on the results of recent diagnostic testing, he indicated that there may be an issue with respect to a peripheral neuropathy, but opined it was not related to appellant's work injury.

Appellant's treating physician, Dr. Hampton J. Jackson, Jr. a Board-certified orthopedic surgeon, continued to diagnose lumbar disc injury at L5-S1 and chronic lumbar radiculopathy as causally related to the work injury. He further stated that appellant's back pain was significant with any prolonged standing, walking and sitting and noted that appellant avoids lifting, pushing and pulling. In a June 6, 2011 report, Dr. Jackson stated that appellant's condition was radiculopathy, not a neuropathy and although he was diabetic, his symptoms were not related to diabetes. On October 19, 2011 he referred to a website in support of his conclusion that the work injury had caused a chemical radiculitis and chronic pain syndrome. Dr. Jackson also cited MRI scan evidence of an L5-S1 protrusion causing an impression on the thecal sac.

OWCP found a conflict in medical opinion between Dr. Fine, the second opinion examiner, and Dr. Jackson, appellant's treating physician, as to whether appellant had any continuing residuals or disability due to his accepted employment injury. On October 31, 2011 it referred appellant, together with a statement of accepted facts and the medical record, to Dr. Robert O. Gordon, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a November 22, 2011 report, Dr. Gordon noted several inconsistent and nonanatomic findings on examination. He found neurological examination of the extremities, including motor, sensory and reflex function, was within normal limits. Dr. Gordon noted that, while the EMG was interpreted to show evidence of radiculitis, he believed that the EMG testing was inaccurate with frequent false positives and was an unreliable indicator for radiculopathy. He

recommended repeat EMG testing. Dr. Gordon further stated that the positive discography at L5-S1 was not surprising considering that appellant had some mild to moderate preexisting degenerative changes at L5-S1. He concluded that appellant sustained a muscular strain which had resolved with no residuals of injury on an objective basis. Dr. Gordon also agreed to review the recent diagnostic testing. On November 30, 2011 he reviewed MRI scans from May 12, 2004 and April 25, 2011. Dr. Gordon found preexisting changes at L5-S1, which had not significantly progressed over the past seven years and were unrelated to the January 8, 2004 work injury.

On December 20, 2011 Dr. Jackson disputed Dr. Fine's report and again cited his opinion regarding damaged tissues and the release of a chemical which caused chemical radiculitis and chronic pain syndrome.

On January 18, 2012 OWCP issued a notice of proposed termination of appellant's compensation and medical benefits.

In a January 12, 2012 report, Dr. Jackson noted his disagreement with Dr. Fine's report and again cited his opinion regarding damaged tissues and the release of a chemical, which caused chemical radiculitis and chronic pain syndrome. Additional progress reports were also submitted.

By decision dated February 22, 2012, OWCP terminated appellant's medical and wage-loss benefits effective March 11, 2012. It found that the weight of the evidence, as represented by Dr. Gordon's opinion, established that his accepted conditions had ceased without residuals.

On March 20, 2012 appellant, through his representative, disagreed with that decision and requested an oral hearing before an OWCP representative, which was held on June 14, 2012.

In a May 23, 2012 report, Dr. Eric G. Dawson, an orthopedic specialist, noted the history of injury and appellant's medical course.<sup>2</sup> He indicated that he had reviewed the MRI scan film taken at the request of Dr. Fine and concluded that it showed a "tangential tear with some healing in the annulus, which is consistent with an injury at this site at the time of the injury itself." Dr. Dawson noted that the examination revealed positive straight leg raising, right lower extremity weakness and discomfort with heel walking on the right side. He concluded that appellant's findings were consistent with L5-S1 disc rupture, which was consistent with an acute injury. Dr. Dawson noted EMG testing showed L5 impingement but was incomplete. He disputed Dr. Gordon's opinion concerning the reliability of EMG testing and asserted it was the "the gold standard for nerve studies." Dr. Dawson recommended that a new EMG be taken and if it showed signs of L5 impingement, it would be "gold standard documentation of injury to the nerve." He also contended that Dr. Gordon's report failed to define which muscle groups were tested and the response obtained. Dr. Dawson "saw nowhere that the myotome was directly tested" and "a general assessment was just made that it was normal."

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<sup>2</sup> Dr. Jackson, appellant's treating physician, had passed away. The record is not clear how appellant came under the care of Dr. Dawson.

A June 1, 2012 EMG was interpreted as showing evidence of bilateral L5-S1 radiculopathy and axonal sensorimotor peripheral neuropathy.

In a June 12, 2012 report, Dr. Dawson stated the June 1, 2012 EMG demonstrated bilateral L5-S1 radiculopathy, more severe on the right. He concluded that this demonstrated “signs of continued aggravation and exacerbation with acute on chronic” and “the [appellant] has an injury now rated as chronic because it has been present for greater than a year.”

By decision dated September 10, 2012, an OWCP hearing representative found that OWCP met its burden of proof to terminate appellant’s compensation benefits but the additional medical evidence from Dr. Dawson was sufficient to warrant further development of the claim. The hearing representative remanded the case to OWCP with instructions that it request a supplemental opinion from Dr. Gordon to comment on Dr. Dawson’s report and explain whether the physical examination results obtained were sufficient to show that the injury-related condition had resolved.

In an October 2, 2012 addendum, Dr. Gordon reviewed Dr. Dawson’s May 23, 2012 report, which he found was one of the most unbelievable medical reports he ever reviewed and stated that his opinion had not changed from his prior opinion that appellant had no residuals or disability related to his work injury. He indicated that he conducted a thorough neurological examination, which included testing for motor, sensory and reflex function, all which tested completely normal. Dr. Gordon indicated that appellant’s physical examination and MRI scan were much more objective indications than appellant’s EMG/NCV studies. He also stated that appellant’s MRI scan reports “showed no acute post-traumatic lateralizing disc herniation or anything else related to this injury or anything that could explain his ongoing subjective complaints.”

By decision dated October 23, 2012, OWCP affirmed the termination of appellant’s wage-loss and medical benefits effective April 8, 2012. Special weight was accorded to Dr. Gordon’s impartial medical opinion and subsequent response to Dr. Dawson’s May 23, 2012 report.

On October 26, 2012 appellant’s representative requested an oral hearing, which was held on February 11, 2013. Appellant’s representative argued that Dr. Gordon’s response to Dr. Dawson’s May 23, 2012 report was insufficiently rationalized to represent the weight of the medical evidence.

In a November 9, 2012 report, Dr. Dawson provided examination findings and opined that appellant has a discopathy and neural radiculopathy. He stated that the 2004 MRI scan demonstrated a central disc protrusion at L5-S1 and the May 2012 repeat MRI scan of the lumbar spine shows a discopathy. Dr. Dawson indicated that Dr. Fine read this as a sagging of the disc at L5 and S1, which would be degenerative changes, but he had described what cuts to look at, noting the #18 demonstrated tangential tear with some signs of healing to the area, which was consistent with an old disc injury. He also indicated that appellant has significant nerve impingement which is documented by the EMG. Dr. Dawson also noted his disagreement with Dr. Gordon’s opinion, which he alleged was not medically accurate and which failed to provide an explanation as to why he believed that appellant had no radiculopathy or disc condition.

By decision dated May 1, 2013, an OWCP hearing representative affirmed OWCP's 2012 termination of benefits. The hearing representative also found that appellant had not met his burden of proof to establish continuing disability after April 8, 2012.

### **LEGAL PRECEDENT -- ISSUE 1**

According to FECA, once OWCP accepts a claim and pays compensation, it has the burden of justifying termination or modification of an employee's benefits.<sup>3</sup> OWCP may not terminate compensation without establishing that the disability had ceased or that it was no longer related to the employment.<sup>4</sup> Its burden of proof includes the necessity of furnishing rationalized medical opinion evidence based on a proper factual and medical background.<sup>5</sup> The right to medical benefits for an accepted condition is not limited to the period of entitlement for disability compensation.<sup>6</sup> To terminate authorization for medical treatment, OWCP must establish that appellant no longer has residuals of an employment-related condition, which require further medical treatment.<sup>7</sup>

Section 8123(a) of FECA provides that if there is a disagreement between the physician making the examination for the United States and the physician of an employee, the Secretary shall appoint a third physician (known as a referee physician or impartial medical specialist) who shall make an examination.<sup>8</sup> This is called a referee examination and OWCP will select a physician who is qualified in the appropriate specialty and who has no prior connection with the case.<sup>9</sup> When there exists opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently well rationalized and based upon a proper factual background, must be given special weight.<sup>10</sup>

### **ANALYSIS -- ISSUE 1**

OWCP accepted that on January 8, 2004 appellant sustained lumbar disc syndrome with myelopathy. Appellant stopped work and was placed on the periodic rolls. OWCP terminated appellant's wage-loss and medical benefits effective March 11, 2012. By decision dated

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<sup>3</sup> *S.F.*, 59 ECAB 642 (2008); *Kelly Y. Simpson*, 57 ECAB 197 (2005); *Paul L. Stewart*, 54 ECAB 824 (2003).

<sup>4</sup> *Jason C. Armstrong*, 40 ECAB 907 (1989); *Charles E. Minnis*, 40 ECAB 708 (1989); *Vivien L. Minor*, 37 ECAB 541 (1986).

<sup>5</sup> *See Del K. Rykert*, 40 ECAB 284, 295-96 (1988).

<sup>6</sup> *A.P.*, Docket No. 08-1822 (issued August 5, 2009); *T.P.*, 58 ECAB 524 (2007); *Kathryn E. Demarsh*, 56 ECAB 677 (2005).

<sup>7</sup> *A.P.*, *id.*; *James F. Weikel*, 54 ECAB 660 (2003); *Pamela K. Guesford*, 53 ECAB 727 (2002).

<sup>8</sup> 5 U.S.C. § 8123(a); *see R.S.*, Docket No. 10-1704 (issued May 13, 2011); *S.T.*, Docket No. 08-1675 (issued May 4, 2009).

<sup>9</sup> 20 C.F.R. § 10.321.

<sup>10</sup> *Darlene R. Kennedy*, 57 ECAB 414 (2006); *Gloria J. Godfrey*, 52 ECAB 486 (2001).

September 10, 2012, however, an OWCP hearing representative found that the additional medical evidence from Dr. Dawson was sufficient to warrant further development of the claim. Following further medical development, in a decision dated October 23, 2012, OWCP affirmed the termination of compensation and medical benefits effective April 8, 2012 based on the reports of the impartial medical examiner, Dr. Gordon. By decision dated May 1, 2013, an OWCP hearing representative affirmed the October 23, 2012 decision.

The Board finds that OWCP properly terminated appellant's benefits effective April 8, 2012 on the grounds that he no longer had any residuals or disability causally related to his accepted employment-related injuries.

OWCP found a conflict in medical opinion between appellant's physician, Dr. Jackson, Jr., who determined that appellant's chronic lumbar radiculopathy and L5-S1 protrusion were causally related to the work injury, and Dr. Fine, the second opinion physician, who opined that appellant had no continuing employment-related residuals and disability. On appeal, appellant's representative contends that OWCP erred when it referred appellant to Dr. Gordon for an impartial medical examination as a true conflict in medical opinion did not exist between Dr. Fine, the second opinion examiner, and Dr. Jackson, the treating physician. He further contends that, even if a true conflict in medical opinion existed, Dr. Gordon did not resolve the conflict. Contrary to appellant's representative assertions, Dr. Fine had access to and reviewed the statement of accepted facts and appellant's medical record, including diagnostic testing done in 2004. While Dr. Fine recommended further diagnostic testing to determine any restrictions based on preexisting conditions, he opined in his May 31, 2011 addendum report, that appellant had no restrictions related to his work injury and the peripheral neuropathy was not related to his work injury. This was in direct conflict with Dr. Jackson's opinion that appellant continued with residuals and disability from his work injury. Accordingly, OWCP properly referred appellant to Dr. Gordon to resolve the conflict.

In his November 22, 2011 report, Dr. Gordon provided an accurate history of injury and reviewed appellant's medical records. He noted that diagnostic testing of record showed evidence of radiculitis, which he believed was inaccurate given the frequent false positives and positive discography at L5-S1, which was expected given appellant's mild to moderate preexisting degenerative changes at L5-S1. Dr. Gordon recommended repeat diagnostic testing. Upon examination, he observed several inconsistent and nonanatomic findings but found a normal neurological examination of the extremities, which included normal findings for motor, sensory and reflex functions. Dr. Gordon concluded that appellant's muscular strain had resolved with no residuals of injury on an objective basis. On November 30, 2011 he reviewed and compared MRI scans of May 12, 2004 and April 25, 2011. Dr. Gordon noted the preexisting changes at L5-S1 had not significantly progressed over the past seven years and opined that they were unrelated to the January 8, 2004 work injury.

The Board finds that Dr. Gordon's reports are sufficiently detailed and well reasoned to constitute the weight of the medical opinion evidence. When there exist opposing medical reports of virtually equal weight and rationale and the case is referred to an impartial medical specialist for the purpose of resolving the conflict, the opinion of such specialist, if sufficiently

well rationalized and based upon a proper factual background, must be given special weight.<sup>11</sup> Dr. Gordon reviewed appellant's history and accurately described the January 8, 2004 employment injury. He conducted both a physical and neurological examination and found that the physical findings did not establish that he continued to suffer residuals or disability from his work-related injuries. Dr. Gordon determined that appellant's present symptoms and diagnostic results of bilateral L5-S1 radiculopathy and peripheral neuropathy were unrelated to the January 8, 2004 work injury. The Board finds that his opinion represents the special weight of medical opinion evidence. Accordingly, Dr. Gordon's opinion constitutes the special weight of evidence and is sufficient to justify OWCP's termination of medical and wage-loss compensation benefits for the accepted conditions.

### **LEGAL PRECEDENT -- ISSUE 2**

As OWCP met its burden of proof to terminate appellant's medical and compensation benefits, the burden shifted to him to establish that he had continuing disability causally related to his accepted employment injury.<sup>12</sup> To establish causal relationship between the claimed disability and the employment injury, appellant must submit rationalized medical opinion evidence based on a complete factual and medical background supporting such a causal relationship.<sup>13</sup>

### **ANALYSIS -- ISSUE 2**

The Board finds that appellant has not established that he has any continuing residuals of his work-related lumbar disc syndrome with myelopathy on or after April 8, 2012.

After the termination of benefits on April 8, 2012, appellant submitted a November 9, 2012 report from Dr. Dawson, which provided examination findings and opined that appellant has a discopathy and neural radiculopathy. This report does not address how any continuing condition or medical restrictions and disability were causally related to the accepted work conditions. Additionally, OWCP never accepted that appellant developed discopathy and neural radiculopathy as a result of his January 8, 2004 work injury and there is no medical evidence to support such a conclusion. The Board has found that vague and unrationalized medical opinions on causal relationship have little probative value.<sup>14</sup> Dr. Dawson also disagreed with Dr. Gordon's opinion, which he alleged was not medically accurate and contained no rationale as to why he believed that appellant had no radiculopathy or disc condition.

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<sup>11</sup> *Id.*

<sup>12</sup> See *Joseph A. Brown, Jr.*, 55 ECAB 542 (2004); *Manuel Gill*, 52 ECAB 282 (2001).

<sup>13</sup> *Daniel F. O'Donnell, Jr.*, 54 ECAB 456 (2003).

<sup>14</sup> See *Franklin D. Haislah*, 52 ECAB 457 (2001); *Jimmie H. Duckett*, 52 ECAB 332 (2001) (medical reports not containing rationale on causal relationship are entitled to little probative value).

Dr. Gordon opined in an October 2, 2012 addendum<sup>15</sup> that his opinion had not changed from his prior opinion that appellant had no residuals or disability related to his work injury. He stated that appellant's physical and neurological examination were normal and the MRI scan was more of an objective indication of appellant's condition than the EMG/NCV studies. Dr. Gordon also stated that appellant's MRI scan reports showed no acute post-traumatic lateralizing disc herniation or anything else related to the work injury or anything that could explain his ongoing subjective complaints.

The Board finds that Dr. Dawson's November 9, 2012 report is insufficient to overcome the special weight accorded to Dr. Gordon's reports as the impartial medical examiner or to create a new conflict.

None of the reports submitted by appellant after the termination of benefits included a rationalized opinion regarding the causal relationship between his current condition and his accepted work-related conditions. Consequently, appellant did not establish any employment-related condition or disability after April 8, 2012.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that OWCP met its burden of proof to terminate appellant's medical and wage-loss benefits effective April 8, 2012 and that he failed to establish that he had any continuing residuals or disability attributable to his accepted conditions after April 8, 2012.

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<sup>15</sup> This report was generated following the September 10, 2012 remand from OWCP's hearing representative for Dr. Gordon to comment on Dr. Dawson's May 23 and June 12, 2012 reports, which found that appellant had an L5-S1 disc rupture consistent with an acute injury and chronic bilateral L5-S1 radiculopathy causally related to the work injury and the June 1, 2012 EMG study.



**ORDER**

**IT IS HEREBY ORDERED THAT** the May 1, 2013 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 5, 2014  
Washington, DC

Colleen Duffy Kiko, Judge  
Employees' Compensation Appeals Board

Patricia Howard Fitzgerald, Judge  
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge  
Employees' Compensation Appeals Board